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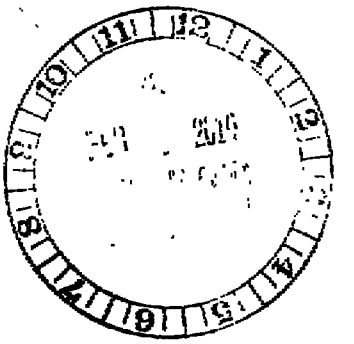
January 29, 2010

VIA UPS OVERNIGHT MAIL



FILED
MAR 29 2010
SURFACE
TRANSPORTATION BOARD

ENTERED
Office of Proceedings
MAR 29 2010
Part of
Public Record

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

RE: Brampton Enterprises, LLC d/b/a Savannah Re-Load v. Norfolk Southern Railway Company
Docket No. ~~FD35849~~ 42118

Dear Ms. Brown:

Please accept this letter as a request for a waiver or reduction of the filing fee associated with the above referenced matter pursuant to 49 C.F.R. 1002.2(e). An original and eleven (11) copies of this Complaint are enclosed with this request. I would be grateful if you would return one copy to me in the enclosed envelope with a notation showing the date of filing in your office.

Brampton Enterprises ("Brampton") has filed this complaint against Norfolk Southern Railway Company ("Norfolk Southern"), to recover damages sustained as a result of Norfolk Southern's imposition of a security deposit based upon accrued demurrage. Norfolk Southern imposed this deposit requirement even though Brampton was not legally liable for any demurrage which may have been due. Norfolk Southern also required Brampton to deposit an exorbitant amount of money that far exceeded the demurrage allegedly owed. Brampton was unable to pay the deposit and the security deposit therefore had the effect of choking off Brampton's rail business for months, causing it severe economic injury. Brampton has therefore filed suit pursuant to 49 U.S.C. § 11704(b) based upon Norfolk Southern's unreasonable rule and practice related to its transportation or service.

My review of 49 C.F.R. 1002.2(c), confirmed by a phone call to the Surface Transportation Board, indicates that there is no actual category of filing fee for this type of complaint. Therefore, it appears to fall within the catchall category under Part V(56)(iv) for "[a]ll other formal complaints (except competitive access complaints)." This category has a filing fee of $21,100. Brampton requests this wavier or reduction because it is in the best interest of the public and a $21,100 filing fee would impose an undue hardship upon Brampton.

FILING FEE WAIVED

This waiver is in the public interest because a filing fee of this magnitude has a chilling effect, discouraging the public from seeking redress of unreasonable rules and practices under 49 U.S.C. § 10702. Complainants who file suit to recover damages resulting from unreasonable rules and practices have already sustained economic injury. Forcing them to pay an additional $21,100 to recover these losses is a severe disincentive to an already-injured complainant and generally deters the public from enforcing its right to reasonable rules and practices. Moreover, if the opportunity to recover economic damages costs $21,100, rail carriers are incentivized to violate 49 U.S.C. § 10702 so long as the injured party will not find it "worth it" to file a complaint. In short, rail carriers can violate 49 U.S.C. § 10702 with impunity so long as their actions do not cause pecuniary injury in excess of $21,100.

The excessiveness of this filing fee in a case of this nature is highlighted when compared to the filing fee for similar cases. For example, 49 U.S.C. § 10702 also prohibits rail carriers from establishing unreasonable rates. The filing fees for complainants who wish to challenge a rail carrier's rates range between $150 and $350. Given the similar nature of these filings, arising from the same statute, a filing fee increase of between 6,000% and 14,000% for claims related to unreasonable rules and practices does not serve the public interest.

Moreover, a $21,100 filing fee imposes an undue hardship upon Brampton. Brampton is a small, family-owned business with six employees which has the capacity to receive five rail cars at any one time. As a result of the actions which give rise to this complaint, Brampton has already lost rail service for months, suffered the resulting disruption to its business relationships, sustained severe pecuniary injury, and incurred legal fees successfully defending itself in the demurrage lawsuit brought by Norfolk Southern in the United States District Court in Savannah. Having to pay $21,100 for an opportunity to be made whole constitutes an undue hardship under these circumstances. Brampton is seeking approximately $249,000 in lost profits; it should not be required to pay a filing fee which constitutes almost 10% of the total claim. Therefore, on behalf of Brampton, I respectfully request a waiver or reduction of this filing fee.

I remain,

Very truly yours,

Jason C. Pedigo

JCP/kdr

Enclosures

CERTIFICATE OF SERVICE

I, Jason C. Pedigo, certify that I have this day served a copy of the Request for Waiver upon all parties of record in this proceeding by UPS overnight mail.

James Hixon
Norfolk Southern
3 Commercial Plaza
Norfolk, Virginia 23510

So certified this 29th day of January, 2010.

Jason C. Pedigo
Georgia Bar Number 140989
Attorney for Complainant

Post Office Box 9946
Savannah, Georgia 31412
(912) 233-9700

BEFORE THE
SURFACE TRANSPORTATION BOARD

BRAMPTON ENTERPRISES, LLC D/B/A SAVANNAH RE-LOAD	)	
Complainant,	)	
v.	)	Docket No. ~~FD35349~~ 42118
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
Defendant	)	

COMPLAINT

Jason C. Pedigo, Esq.
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Phone: (912) 233-9700
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Dated: January 29, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

BRAMPTON ENTERPRISES, LLC D/B/A SAVANNAH RE-LOAD Complainant, v. NORFOLK SOUTHERN RAILWAY COMPANY, Defendant	)	Docket No. FD35349

COMPLAINT

Complainant Brampton Enterprises, LLC d/b/a Savannah Re-Load (hereinafter "Brampton") files this Complaint, showing the Surface Transportation Board (hereinafter "Board") as follows:

1.

Brampton is a Georgia limited liability company with its primary place of business located at 139 Brampton Road, Savannah, Georgia 31408.

2.

Norfolk Southern Railway Company (hereinafter "Norfolk Southern") is a Virginia Corporation with its primary place of business at 3 Commercial Plaza, Norfolk, Virginia 23510.

3.

Norfolk Southern's Chief Legal Officer, James Hixon, may be found at 3 Commercial Plaza, Norfolk, Virginia 23510, and is being served there with this Complaint.

4.

Pursuant to 49 U.S.C. § 10702(2), Norfolk Southern is required to establish reasonable rules and practices on matters related to transportation or service subject to the jurisdiction of the Board.

5.

The imposition of a demurrage security deposit requirement based upon an alleged demurrage debt is a rule and practice subject to the exclusive jurisdiction of the Board.

STATEMENT OF FACTS

6.

Brampton is a warehouseman whose business consists, in part, of unloading freight delivered to its facility and "reloading" it for export to foreign countries through the Georgia Ports Authority.

7.

Approximately 30%-35% of Brampton's revenue comes from unloading and reloading rail freight.

8.

Norfolk Southern is the only rail carrier which services Brampton's facility. All rail freight sent to Brampton's facility for reloading is therefore delivered by Norfolk Southern. As a result, when Norfolk Southern refuses to deliver freight to Brampton's facility, Brampton has no alternative means to receive rail freight.

9.

Beginning in February 2007, and continuing through August 2007, Norfolk Southern submitted monthly invoices to Brampton for demurrage for which Norfolk Southern claimed Brampton was liable.

10.

Brampton was not liable for any demurrage which may have accrued during that time period and was under no obligation to pay any demurrage.

11.

Each of the invoices Norfolk Southern submitted improperly calculated the amount of demurrage due so that each invoice demanded payment in excess of the demurrage which actually accrued.

12.

On July 25, 2007, Norfolk Southern concluded that it had overbilled Brampton in every demurrage invoice and revised each of its monthly demurrage invoices downwardly so that its overall demurrage demand was reduced to $57,300.

13.

At all times relevant to this Complaint, Norfolk Southern had a tariff provision, NS 8002-A, which permitted it to impose a deposit requirement upon those who owe it demurrage.

14.

Pursuant to this tariff provision, Norfolk Southern informed Brampton on July 31, 2007, that it would no longer deliver rail freight unless Brampton first paid a deposit for each car delivered.

15.

At all times relevant to this Complaint, Norfolk Southern's demurrage deposit was non-transferrable and required Brampton to pay a new deposit for each car that arrived.

16.

While the deposit requirement was in effect, Brampton paid the deposit several times. Each time it took Norfolk Southern between 36 and 81 days to return the deposit after the rail car was returned to Norfolk Southern.

17.

Brampton's facility can handle five rail cars per switch. Norfolk Southern will perform a maximum of one switch per day.

18.

The demurrage deposit amount that Norfolk Southern imposed upon Brampton was $1,200 per rail car.

19.

During the time period Norfolk Southern incorrectly claimed Brampton was liable for demurrage, Brampton typically unloaded five rail cars per day.

20.

Pursuant to this demurrage deposit requirement, if Brampton unloaded five rail cars per day, it would be required to pay $6,000 per day for 36 to 81 days before it began receiving a refund of its deposit. Under this scenario, Brampton would have between $216,000 and $486,000 deposited with Norfolk Southern at any one time in order to receive rail service.

21.

Brampton did not have $216,000 to $486,000 to "deposit" with Norfolk Southern and was therefore forced to cease warehousing rail freight.

22.

Brampton's inability to receive rail freight caused its revenues to drop sharply and ruptured its business relationship with Galaxy Forwarding, the freight forwarding company which sent rail freight to Brampton's facility at the time the demurrage deposit was imposed. Brampton has not been able to restore its business relationship with Galaxy Forwarding.

23.

On October 11, 2007, Norfolk Southern filed suit in the United States District Court for the Southern District of Georgia, demanding payment for the demurrage described above in the amount of $133,080.

24.

On March 31, 2008, Norfolk Southern reduced its demurrage demand in the lawsuit, this time to $70,680.00.

25.

Norfolk Southern's March 31, 2008 reduction was prompted by its realization that it could not include certain shipments in its demurrage calculations.

26.

Norfolk Southern continued to take the position that Brampton was liable for demurrage totaling $70,680.00 on the remaining shipments.

27.

Brampton was, in fact, not liable for any demurrage that may have accrued on the remaining shipments.

28.

Norfolk Southern did not adjust the demurrage deposit amount it demanded from Brampton's facility following this reduction in its demurrage demand.

29.

On September 15, 2008, the United States District Court of the Southern District of Georgia issued an order in which it held that Brampton was not liable for any demurrage sought by Norfolk Southern. An accurate copy of the court's order is attached hereto as Exhibit A.

30.

Despite the District Court's ruling, Norfolk Southern refused to lift the demurrage deposit requirement.

26.

Norfolk Southern lifted its deposit requirement when the parties entered into a contingent settlement agreement on December 12, 2008.

31.

The contingency to the settlement agreement failed, and, on March 4, 2009, Norfolk Southern re-imposed its deposit requirement.

32.

Norfolk Southern lifted its deposit requirement on March 20, 2009, only after the District Court for the Southern District of Georgia threatened to sanction Norfolk Southern for its continued imposition of the deposit requirement. An accurate copy of the court's order is attached as Exhibit B.

33.

Norfolk Southern established rules or practices which were unreasonable by imposing a demurrage deposit requirement based upon demurrage for which Brampton was not liable.

34.

Norfolk Southern established rules or practices which were unreasonable by using its demurrage deposit requirement in an attempt to coerce Brampton to pay demurrage which Brampton did not owe.

35.

Norfolk Southern established rules or practices which were unreasonable by imposing a demurrage deposit requirement on Brampton before ascertaining the correct amount of demurrage due.

36.

Norfolk Southern established rules or practices which were unreasonable by imposing a demurrage deposit requirement based upon demurrage for which Norfolk Southern did not contend Brampton was liable.

37.

Norfolk Southern established rules or practices which were unreasonable by failing to adjust the amount of the deposit imposed upon Brampton after reducing its demurrage demand.

38.

Norfolk Southern established rules or practices which were unreasonable by imposing a demurrage deposit requirement which imposed an undue financial burden upon Brampton.

39.

Norfolk Southern established rules or practices which were unreasonable by imposing a demurrage deposit requirement that did not allow for the timely return of the deposit where Brampton received daily shipments. This rule or practice meant that Brampton had to deposit between $216,000 to $486,000 in order receive freight deliveries where the total demurrage Norfolk Southern demanded was $70,680.

41.

As a result of Norfolk Southern's unreasonable rules and practices set forth above, Brampton was unable to receive, warehouse, or reload freight delivered by rail.

42.

Norfolk Southern's unreasonable rules and practices are in violation of 49 U.S.C. § 10702(2).

43.

Norfolk Southern's violation of 49 U.S.C. 10702(2) has caused Brampton to sustain pecuniary damages.

44.

Norfolk Southern is liable to Brampton for the damages Brampton has sustained pursuant to 49 U.S.C. § 11704(b).

45.

Brampton is entitled to recover its profits lost during the two-year period preceding the date this Complaint is received for filing.

46.

Brampton's damages include lost profits up to $249,000 due to its inability to receive rail freight during the two-year period preceding the date this Complaint is received for filing.

WHEREFORE, Brampton prays for the following relief:

a. an order awarding Brampton its lost profits for the two-year period preceding the date of this Complaint, together with costs, prejudgment interest and attorney's fees; and

b. such other relief as the Board may allow.

This 29th day of January, 2010.

ELLIS, PAINTER, RATTERREE & ADAMS LLP

By: _____

Jason C. Pedigo
Georgia State Bar No. 140989
Attorneys for Complainant

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Exhibit A

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff,

v.

BRAMPTON ENTERPRISES, LLC d/b/a SAVANNAH RE-LOAD,

Defendant.

CASE NO. CV407-155

O R D E R

Before the Court are the Motion for Summary Judgment by Defendant Brampton Enterprises, LLC d/b/a Savannah Re-Load ("Savannah Re-Load")(Doc. 25) and the Motion for Partial Summary Judgment by Plaintiff Norfolk Southern Railway Company (Doc. 29). For the reasons that follow, Savannah Re-Load's Motion for Summary Judgment is **GRANTED**, and Norfolk Southern's Motion for Partial Summary Judgment is **DENIED**.[1]

BACKGROUND

Defendant Savannah Re-Load is a warehouse business that receives and forwards freight. In late 2006, Savannah Re-Load began handling freight shipped on rail cars owned by Plaintiff Norfolk Southern.

[1] Norfolk Southern's Request for Oral Argument (Doc. 50) is **DENIED**.

Norfolk Southern transported freight on behalf of various shippers and delivered it to Savannah Re-Load. The majority of the bills of lading for the freight identified Savannah Re-Load as the consignee who was to receive the goods. A "bill of lading" is a "document of title acknowledging the receipt of goods by a carrier or by the shipper's agent" and "a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods." Blacks' Law Dictionary 159 (7th ed. 1999). A "consignee" is "one to whom something is consigned or shipped." See Webster's Third New International Dictionary (1971)(unabridged). "Consign" means "[t]o transfer to another's custody or charge" or "[t]o give (goods) to a carrier for delivery to a designated recipient." Black's Law Dictionary 303 (7th ed. 1999).

Under the controlling tariff set by Norfolk Southern, a consignee is allowed two days to unload freight without incurring demurrage charges. Demurrage is "a charge exacted by a carrier from a shipper or consignee on account of a failure to load or unload cars within the specified time prescribed by the applicable tariffs. Railroads charge shippers and receivers of freight 'demurrage' fees if the shippers or receivers detain freight cars on the

rails beyond a designated number of days." CSX Transp. Co. v. Novolog Bucks County, 502 F.3d 247, 251 n.1 (3d Cir. 2007)(quoting Union Pac. R.R. Co. v. Ametek, Inc., 104 F.3d 558, 559 n.2 (3d Cir. 1997)). "It is intended to both compensate for the delay, and to promote efficiency by deterring undue delays." CSX Transp., Inc. v. City of Pensacola, 936 F. Supp. 880, 883 (N.D. Fla. 1995)(internal citation omitted).

Norfolk Southern alleges that Savannah Re-Load is liable for demurrage for the failure to timely unload and return the rail cars. It relies on the bills of lading, which identify Savannah Re-Load as a consignee. After the delays, Norfolk Southern sent invoices to Savannah Re-Load for the demurrage charges.[2] These invoices also identified Savannah Re-Load as the consignee.

Savannah Re-Load maintains that it was not a consignee for the freight and is, therefore, not liable for demurrage. According to Savannah Re-Load, freight-forwarding companies make their transport arrangements—to send freight via Norfolk Southern or other carriers—without

[2] Norfolk Southern computes demurrage monthly. At the end of each month, a customer's total demurrage days are netted against total credits for returning rail cars early. If total demurrage days exceed credits, those days are charged at the daily rate for demurrage as published in Norfolk Southern's tariff. (See Doc. 26 Ex. C.)

Savannah Re-Load's input. (See Groves Aff., Doc. 26 Ex. A.) The freight-forwarding companies unilaterally give Savannah Re-Load notice that a given shipment is enroute to its facility. After the freight arrives at the facility, Savannah Re-Load unloads the freight and forwards it to various ports for export according to instructions from the freight-forwarding company. Savannah Re-Load never takes any ownership interest in the freight it handles and is never the freight's final destination. Savannah Re-Load is never a party to the transportation contract, and only operates as instructed by the freight-forwarding companies. (Id.)

Savannah Re-Load also contends that it is neither provided with copies of the bills of lading nor informed of the contents of the bills of lading. (Id. at 1.) With respect to the freight at issue in this case, Savannah Re-Load did not draft, approve of, or receive any bills of lading associated with the rail freight at any time. Similarly, it did not receive copies of the purchase or transportation contracts. In general, Savannah Re-Load does not inspect or evaluate freight to see if it arrives in conformity with the purchase or transportation contract. Savannah Re-Load admits that it was identified as a consignee in the bills of lading, but claims that this was

a unilateral act of the shipper, about which it had no knowledge. (Id.)

ANALYSIS

It is well-established that one must be a consignee or a party to the transportation contract in order to be liable for demurrage. Middle Atl. Conference v. United States, 353 F. Supp. 1109, 1118 (D.D.C. 1972). The parties agree that the issue before the Court in this case is whether Defendant Savannah Re-Load was a consignee of the freight delivered by Plaintiff Norfolk Southern. Norfolk Southern contends that Savannah Re-Load was a consignee because it was identified as a consignee on the bills of lading and because it accepted delivery of the rail cars and the freight. Savannah Re-Load argues that it cannot be made consignee merely because a third party unilaterally listed it as such without its knowledge or consent.

I. Savannah Re-Load did not receive notice that it was listed as a consignee.

Savannah Re-Load claims that it did not receive notice that it was listed as a consignee in the bills of lading. The operator of Savannah Re-Load, Billy Groves, states that Savannah Re-Load did not receive any bills of lading and was never informed that the bills of lading identified it as a consignee. (Groves Aff. at 1-2.)

Norfolk Southern acknowledges that it did not provide Savannah Re-Load with bills of lading because this is not standard practice in the industry. Norfolk Southern surmises that Savannah Re-Load received notice of its consignee designation in the forwarding instructions from the freight-forwarding companies, but there is no evidence of this. Norfolk Southern informed Savannah Re-Load of the consignee designation in invoices it sent to Savannah Re-Load for demurrage after the delays occurred, and therefore after the demurrage claim arose. There is no other evidence that Savannah Re-Load received any notice that it was designated as a consignee on the bills of lading.

In the absence of a genuine issue of material fact, the Court finds that Savannah Re-Load had no knowledge that it was listed as a consignee until after the delays occurred.

II. Savannah Re-Load was not a consignee.

The Court holds that Savannah Re-Load cannot be made a consignee by the unilateral action of a third party, particularly where Savannah Re-Load was not given notice of the unilateral designation in the bills of lading. There are no binding decisions on this issue in the Eleventh Circuit, and other courts have issued conflicting decisions. But, as explained below, the weight of

authority supports this holding and provides the more reasonable result under the specific facts of this case.

The Interstate Commerce Commission Termination Act (ICCTA) governs the demurrage liability of consignee-agents when the transportation is provided by a rail carrier. The consignee-agent liability provision provides, in pertinent part:

> When the shipper or consignor instructs the rail carrier transporting the property to deliver it to a consignee that is an agent only, not having beneficial title to the property, the consignee is liable for rates [for transportation] billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates [including demurrage] that may be found to be due after delivery if the consignee gives written notice to the delivering carrier before delivery of the property (A) of the agency and absence of beneficial title; and (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743(a)(1).

In a case involving similar facts, the Seventh Circuit held that this statute "applies only to agents who are also consignees, and not to agents who are not consignees." Ill. Cent. R.R. Co. v. S. Tec Develop. Warehouse, Inc., 337 F.3d 813, 817 (7th Cir. 2003). After concluding that the statute only applies to consignees, the court reasoned that the preliminary issue was whether the defendant warehouseman was a consignee. Although the case was

remanded to the district court for a final determination of the warehouseman's status, the Seventh Circuit stated that "being listed by third parties as a consignee on some bills of lading is not alone enough to make a [warehouseman] a legal consignee liable for demurrage charges." Id. at 821.

The South Tec opinion is consistent with several other decisions. In Southern Pacific Transportation Co. v. Matson Navigation Co., 383 F. Supp. 154 (N.D. Cal. 1974), the court held that the defendant terminal operator was not liable for demurrage. The defendant was not named as consignee on the bills of lading for most of the shipments, but was named as consignee for some of the shipments. First, the court held that the defendant could not be liable for demurrage where the bills of lading named it as a "care of" party and not as consignee. The court then stated:

> Turning now to those instances where [the terminal operator] was named consignee on the railroad bill of lading, the Court observes that the holding set forth above does not necessitate a holding here that anyone named as consignee in a contract of transportation can be held liable for demurrage.
>
> There is no evidence that [the terminal operator] authorized shippers to consign goods to it or that it performed its task differently in those instances. In fact the sole difference between the two situations was the shipper's unilateral decision whom to name as consignee. The instant case differs in this respect from the others cited by the parties, where the consignee

> was either the purchaser of the cargo or, at least, the person to whom final delivery was to be made and who thus had an interest in and control over the cargo.

Id. at 157. Based on this reasoning, the court held that the defendant was not liable for demurrage where it was unilaterally named by the shipper as consignee in the bills of lading. To hold otherwise, stated the court, "would be to place a connecting carrier's liability totally within the shipper's control, a result the [c]ourt cannot sanction." Id.; see also Union Pac. R.R. Co. v. Carry Transit, Inc., No. 3:04-CV-1095B (N.D. Tex. 2005)(declining to "untether the law of demurrage from its contractual moorings" and holding that "a [shipper's] unilateral decision to name a non-party to the transportation contract . . . as a consignee without its consent does not render the non-party a consignee liable for demurrage charges"); W. Md. Ry. Co. v. S. African Marine Corp., 1987 WL 16153, *4 (S.D.N.Y. 1987)(holding that a connecting ocean carrier is not liable for rail demurrage charges "merely by virtue of being named by the shipper as the consignee in the rail bills of lading"); see generally CSX Transp., Inc. v. City of Pensacola, 936 F. Supp. 880, 884 (N.D. Fla. 1995)(finding defendant not liable for demurrage where it had not been named as consignee in the

bills of lading, but stating in dicta that the "unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage").

In opposition to this line of authorities, Norfolk Southern relies on a recent decision by the Third Circuit in CSX Transportation Co. v. Novolog Bucks County, 502 F.3d 247 (3d Cir. 2007). The Third Circuit "decline[d] to follow" the authorities cited above, specifically the Seventh Circuit's decision in South Tec. Id. at 259. Instead, the Third Circuit held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another and comply with the notification procedures established in ICCTA's consignee-agent liability provision, 49 U.S.C. § 10743(a)(1)." Id. at 254. According to the Third Circuit, the statutory provision applies to an entity listed as consignee on the bill of lading, even if the entity was unilaterally named as consignee by the shipper, is not a party to the transportation contract, and has no ownership interest in the freight. Id. at 252. Under the Third Circuit's reading of the statute, "a transloader or other such entity, if named on the bill of lading as the

sole consignee, is presumptively liable for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status [as an agent] in writing prior to the delivery." Id. at 250 (emphasis added). The court reasoned that consignee status was established by "the documented designation of an entity as a consignee and that entity's acceptance of the freight." Id. at 257.

In this case, Norfolk Southern argues, based on the Novolog decision, that Savannah Re-Load is liable for demurrage because (1) Savannah Re-Load is identified as a consignee on the bills of lading; (2) Savannah Re-Load accepted delivery of the rail cars and the freight; and (3) Savannah Re-Load did not notify Norfolk Southern of its agent status and the name and address of the beneficial owner. Effectively, Norfolk Southern contends that Savannah Re-Load accepted it status as consignee by accepting the freight, and it suggests that Savannah Re-Load could have rejected these terms by rejecting the freight or giving notice of its agent status.

The Court disagrees. Consistent with Seventh Circuit's decision in South Tec, the Court holds that ICCTA's consignee-agent liability provision applies only to consignees. South Tec, 337 F.3d at 817. Therefore, an

entity that is not a consignee is not obligated to comply with the statutory notice provisions in order to avoid liability for demurrage, and such an entity does not become a consignee by operation of the statute.

The Court also holds that a theory of acceptance by conduct is inapplicable to a situation where Savannah Re-Load was unaware of terms set unilaterally by third parties. As discussed above, there is no evidence that Savannah Re-Load was provided with the bills of lading or informed of the terms of the bills of lading. The Court finds that the Novolog rule of presumptive liability cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties.

In South Tec, the Seventh Circuit suggested that being listed on the bills of lading, "coupled with other factors," might be enough to render a warehouseman a consignee. South Tec, 337 F.3d at 821. Such "other factors" could include receiving notice of a consignee designation, playing an active role in the railroad transportation contract, or having an interest in or control over the goods. See id. at 821-22; W. Md. Ry. Co.,

1987 WL 16153 at *4; Matson, 383 F. Supp. at 157. But factors such as these are not at play in this case.[3]

Next, Norfolk Southern argues that "regardless of whether Savannah Re-Load was provided with the necessary documentation, the fact remains that the rail cars were delivered to Savannah [Re-Load] by Norfolk Southern, and that while those rail cars were in the control, custody, and possession of Savannah [Re-Load], the federal law requiring demurrage was frustrated by Savannah[Re-Load]'s detention of rail cars in excess of the allotted amount of time." (Plf.'s Reply at 7.) Although such a rule would be appealing in its simplicity, it is inconsistent with the well-established law that one must be a consignee or a party to the transportation contract in order to be liable for demurrage. Middle Atl. Conference, 353 F. Supp. at 1118. And as explained above, Savannah Re-Load cannot be made a consignee by the unilateral action of a third party

[3] Norfolk Southern states that after it demanded payment for the demurrage charges, representatives from Savannah Re-Load disputed the manner in which the demurrage charges were calculated, but never disputed that it was the consignee that had responsibility to pay the demurrage charges. With this statement, Norfolk Southern suggests that Savannah Re-Load admitted its liability in negotiations prior to the filing of this lawsuit. This is insufficient to create a legal liability. Savannah Re-Load did not pay any of the demurrage invoices, and Norfolk Southern brought this lawsuit as a result.

where Savannah Re-Load was not given notice that it was listed as a consignee in the bills of lading.

CONCLUSION

Accordingly, Savannah Re-Load's Motion for Summary Judgment is **GRANTED**. Norfolk Southern's Motion for Partial Summary Judgment is **DENIED**. The Clerk of Court is **DIRECTED** to **CLOSE** this case.

SO ORDERED this 15th day of September, 2008.

WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

Exhibit B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY, Plaintiff, v. BRAMPTON ENTERPRISES, LLC d/b/a SAVANNAH RE-LOAD, Defendant.	)	CASE NO. CV407-155

O R D E R

Before the Court is a Motion for Expedited Briefing Schedule by Defendant Brampton Enterprises, LLC d/b/a Savannah Re-Load ("Savannah Re-Load"). (Doc. 86.) After careful consideration, Defendant's Motion is **GRANTED IN PART**. Plaintiff must file a response to Defendant's Motion to Enforce Judgment (Doc. 85) by **March 30, 2009.**[1]

In its September 15, 2008 Order, this Court granted Defendant's Motion for Summary Judgment and held that it was not liable to Plaintiff for demurrage fees. (Doc. 29.) That Order resolved a dispute between one plaintiff and one defendant, and was based on facts specific to the controversy. The Court's Order has no effect on Plaintiff's contractual relations with its other customers.

[1] Defendant requested that Plaintiff's response be filed on or before March 23, 2009.

According to Defendant, Plaintiff has decided to ignore this Court's Order while the case is on appeal, treating the unpaid demurrage fees as a debt owed by Defendant. The terms of their contractual agreement allow Plaintiff to charge a $1,200 per day, per railcar deposit when a customer owes it demurrage fees. These deposits may prevent Defendant from warehousing freight in Savannah and result in significant loss of business.

While the Court expresses no opinion as to the merits of Defendant's Motion to Enforce Judgment, Plaintiff's failure to recognize this Court's Order exposes it to significant risks. This Court will not hesitate to exercise its jurisdiction to preserve the status quo while this case is pending on appeal. See Farmhand, Inc. v. Anel Eng'g Indus., Inc., 693 F.2d 1140, 1145-46 (5th Cir. 1982) (recognizing the continuing jurisdiction of the district court in support of its judgment). If Plaintiff chooses not to respect this Court's authority, the Court has ample resources from which to draw upon, such as awards of attorney's fees and other more severe sanctions. In addition, Plaintiff later may find itself liable to Defendant for business losses incurred when it turned a blind eye to this Court's Order. While these are decisions for another day, Plaintiff should strongly consider the

potential pitfalls created by brushing aside an order of the Court.

After careful consideration, Defendant's Motion is **GRANTED IN PART.** Plaintiff must file a response to Defendant's Motion to Enforce Judgment by **March 30, 2009.**

SO ORDERED this 19th day of March, 2009.

WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

CERTIFICATE OF SERVICE

I, Jason C. Pedigo, certify that I have this day served a copy of the Complaint upon all parties of record in this proceeding by UPS overnight mail.

James Hixon
Norfolk Southern
3 Commercial Plaza
Norfolk, Virginia 23510

So certified this 29th day of January, 2010.

Jason C. Pedigo
Georgia Bar Number 140989
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